

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act-)
Competitive Bidding)

COMMENTS ON EMERGENCY PETITION FOR WAIVER

The National Telephone Cooperative Association ("NTCA") submits these Comments in accordance with the Commission's Public Notice released in this matter on March 29, 1995 (DA 95-651). NTCA is a national association representing approximately 500 small and rural independent local exchanges carriers ("LECs") providing telecommunications services to interexchange carriers and subscribers throughout rural America. NTCA members have a long standing and continuing interest in providing state-of-the-art telecommunications services, including spectrum-based services, to rural areas. NTCA recognizes that the adoption of rules compelling sale of the spectrum to the highest bidder has in the past and continues now to present substantial financial hurdles for its members wishing to provide PCS in rural areas or anywhere. Thus, while NTCA did not originally support the concept of auctioning spectrum, throughout this proceeding, NTCA has supported adoption of rules allowing its members to have a meaningful opportunity to participate in the provision of broadband Personal Communications Services (PCS).

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NTCA members have 100,000 or fewer access lines, including affiliates and are "rural telephone companies" as defined by 47 C.F.R. § 24.720(e). All meet the 47 C.F.R. § 24.709 requirements established for entrepreneurs eligible to bid on frequency Blocks C and F. All but a handful are "small businesses" with average annual gross revenues of no more than \$40 million as defined in 47 C.F.R. § 24.720(b) and may use bidding credits, installment payments and reduced upfront payments provided by 47 C.F.R. § 24.711. While the rules the Commission adopted have created opportunities, not guarantees, for NTCA members and others, NTCA recognizes that the rules can not be perfect. It therefore supports Telephone Electronics Corporation's ("TEC") request for a waiver which, in this case, will prevent irreparable harm to the larger public while providing a narrow exception to existing rules for TEC.

TEC has requested a limited waiver of the Commission's rules promulgated in the Fifth Report and Order, 9 FCC Rcd 5532 (1994) and in the Fifth Memorandum Opinion and Order, 10 FCC Rcd 403 (1994). These decisions are the subject of an appeal and preliminary injunction in Telephone Electronics Corporation v. F.C.C. and the United States of America, Case No. 95-1015 (D.C. Cir.). TEC requests the following limited exceptions to the Commission's rules: (1) a waiver of Section 24.709(a)(1) of the rules to the extent that rule is applied to include the gross revenues of TEC's non-rural telephone company affiliates in determining whether a rural telephone company meets the gross

revenue cap of \$125 million in each of the last two calendar years;¹ (2) permission for its rural telephone companies to bid on channel C and F licenses only in those basic trading areas ("BTAs") where they provide telephone service and which have a population of less than 300,000, as defined in the 1990 census; and (3) a waiver of the rules to permit TEC's rural telephone companies to receive the 10% bidding credit provided other small businesses, and, in the event any of its rural telephone companies are successful in the bidding process, to permit those companies to utilize the installment payment procedure that is available to all other designated entities bidding in the auction for licenses in the entrepreneurs' blocks.²

NTCA supports TEC's limited request because a waiver will change the existing status quo which is harmful to NTCA members and the public. Under that status quo, the winners of Block A and B Major Trading Area ("MTA") licenses are benefitting from the delay and uncertainty surrounding the entrepreneur block auctions. MTA Block A and B winners have won auctions, made down payments and are swiftly making financing and deployment plans for PCS.³ In this interim, potential bidders for the entrepreneur blocks are in a wait and see mode that prevents them from making any firm

¹ It does not seek a waiver of the gross revenue cap itself, or of the \$500 million total assets cap.

² TEC Petition at 1 and 2.

³ See, e.g., Keller, Sprint Puts Price Tag of up to \$8 Billion on Foray into Local Phone Markets, Wall St. J., March 30, 1995, at B7, Col.1.

plans with respect to financing for bidding, deploying services or negotiating with incumbent microwave licensees. As a result of the uncertainty, Block A and B licensees, if allowed to proceed, will have even more of a competitive advantage than that previously anticipated to result from the rules giving them larger geographic licensing areas and providing for earlier auctioning of Blocks A and B. Delay and maintenance of the status quo is injurious to the public interest in these circumstances. The Commission's overriding interest in promoting competition and fostering innovation among a wide number of providers is obviously not served by a scheme which gives one set of licensees a head start that could amount to more than a year in view of the September 1995 oral argument date set by the Court. Unless the Commission stays issuance of the Block A and B licenses, lengthy administrative proceedings extending beyond September 1995 would most certainly adversely affect potential bidders for Blocks C and F and reduce healthy competition.

The scope of injury to the public goes beyond the interests of potential bidders to include the public which has an interest in receiving broadband PCS services as well as a large number and broad range of service and manufacturing businesses previously encouraged by Commission announcements hailing the creation of numerous jobs and business opportunities for the entrepreneurs who would be the new telecommunications providers. Without a stay, the potential for harm to the consuming public is implicit in delayed deployment of services on Blocks C and F and in delay of

all licensing. Irreparable injury will also occur to other businesses that have provided, or are preparing to provide, equipment to potential bidders as well as the consulting, engineering, and financial services needed to make the deployment of Block C and F services a reality. In this context, the Commission has ample basis to find that good cause justifies the grant of a waiver. Moreover, TEC has demonstrated that a waiver is proper under WAT Radio v. F.C.C., 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) and Northeast Cellular Telephone Co. v. F.C.C., 897 F.2d 1164 (D.C. Cir. 1990).

A waiver designed to facilitate a prompt auction of Blocks C and F would serve the public interest by preserving the integrity of the licensing process established by the Commission. The validity of the statutory framework for licensing by auctions is conditioned by the requirement that competitive bidding promote objectives that include "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A). A waiver designed to prevent the delay Congress sought to avoid would fulfil the Congressional intent and comply with the Commission's practice of allowing waivers of its rules when application of the rule is not in the public interest.⁴

⁴ See, In the Matter of US West Communications and Gila River Telecommunications, Inc. Joint Petition for Waiver of the Definition of "Study Area," 7 FCC Rcd 2161 (1992).

Moreover, Commission approval of a waiver under the circumstances would constitute permissible "fine-tuning" designed to ameliorate the effect of rules that cannot and did not include every potential beneficiary of the Congressional objectives listed in 47 U.S.C. § 309(j). See, National Association of Broadcasters v. FCC, 740 F.2d 1190, 1208 (D.C. Cir. 1984) and Telocator Network of America v. FCC, 691 F.2d 525, 550, n.191 (D.C. Cir. 1982).

Conclusion

For the above stated reasons, NTCA supports TEC's request for a waiver.

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March 31, 1995

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing
Comments of the National Telephone Cooperative Association in
PP Docket No. 93-253 was served on this 31st day of March 1995,
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